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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 962, 963, 980
(October Term, 1940)

MARTIN M. GOLDMAN, JACOB P. SHULMAN, AND THEODORE GOLDMAN,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF ON BEHALF OF NATIONAL FEDERATION FOR CONSTITUTIONAL LIBERTIES *AMICUS CURIAE.*

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against

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the National Federation for Constitutional Liberties, an unincorporated association, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. Consent to such filing has been duly given by all the par-

ties hereto, including the Solicitor General, and filed with the clerk of this Court.

The National Federation for Constitutional Liberties is pledged to the defense and extension of the Bill of Rights. Its members and affiliates, consisting of individuals, trade unions and civic organizations throughout the United States, are deeply concerned with every invasion of the freedoms therein guaranteed.

It is the profound belief of the National Federation for Constitutional Liberties that in these critical times a sweeping declaration in favor of the rights of the people to be free from unreasonable search and seizure will be a powerful stimulus to that national unity which is necessary for the total defense of our land, our homes and institutions, against the destructive forces of fascism.

The Federation's interest in this case is limited to its constitutional aspects. The Federation is convinced that the decisions below violate the search and seizure provisions of the Fourth Amendment and may, if unreversed, serve as a precedent for the curtailment of the beneficent protection which that amendment affords to the rights of the people.

ABRAHAM J. ISSERMAN,
NATHAN WITT,
Counsel for Federation for
Constitutional Liberties.

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BRIEF ON BEHALF OF NATIONAL FEDERATION FOR CONSTITUTIONAL LIBERTIES *AMICUS CURIAE*.

Statement.

This brief is directed solely to the constitutional question involved in the method by which the evidence used to convict the petitioners of a federal crime was obtained.

The facts of the alleged crime, amply detailed in the briefs of the parties, need not be repeated here. The only facts with which we are here concerned relate to certain activities of agents of the Federal Bureau of Investigation. These agents were informed that a conspiracy was under

way to violate Section 52 (b) (5) of the Bankruptcy Act, and that one of the conspirators was the petitioner Shulman, a New York attorney with offices in Rooms 1509-1510 of an office building in Manhattan. Being apprised in advance of meetings to be held in Shulman's office in connection with the alleged conspiracy, the agents arranged to overhear whatever conversation might take place.

To this end, the federal agents, prior to the meetings, entered Shulman's offices at night, without his knowledge or consent (R. 120). They inspected those offices and their physical arrangement, fully memorizing its layout, its subdivision into smaller offices, the exact portion of the entire suite which was used for Shulman's private office, and the location of the desk and chairs in that private office (R. 103, 112-114, 120-121, 140-142). They observed that near the bottom of one wall of Shulman's private office there was an opening for the entry or passage of steam-heating pipes between that office and Room 1508 adjoining it, (R. 87) which latter office was untenanted at the time (R. 33). The aperture being larger than the steam-pipe, the federal officers inserted and left therein a "carbon microphone" (R. 87), which was connected by wire to an amplifier, the latter being placed in Room 1508 (R. 86).

Thereafter, and for the purpose of overhearing conversations taking place in Shulman's office, the federal agents returned to Room 1508, equipped with headphones to be attached to the aforementioned microphone and amplifier (R. 101-105, 122). They were also equipped with an additional or auxiliary device for listening in on the conversations to be held in Shulman's office, known as a detectaphone, or contact microphone (R. 101, 121-122, 134-135).

This was substantially similar to the carbon microphone but its sensitivity or efficiency was greater, thus permitting its effective use by being placed against the outside of the walls on Room 1509. It did not require any aperture opening into Shulman's office (R. 94, 101).

The government contended that it secured its evidence over the detectaphone only (R. 101-102), and that since the detectaphone did not necessarily require a breaking into, or (so they claim) direct physical trespass upon, Shulman's office, there was no violation of the Fourth Amendment.

ARGUMENT.

POINT ONE.

The use of evidence, secured with the aid of a trespass of petitioner's premises, was a violation of petitioners' rights under the Fourth Amendment.

The constitutional guaranty of privacy, the constitutional right of the people to be secure against unreasonable searches and seizures, is not disputed by the government. The unbroken line of Supreme Court decisions permits no dispute of that right. The cases include:

Boyd v. *United States,* 116 U. S. 616; *Bram* v. *United States,* 168 U. S. 532; *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Amos* v. *United States,* 255 U. S. 313; *Agnello* v. *United States,* 269 U. S. 20; *Byars* v. *United States,* 273 U. S. 28.

The rulings in those cases clearly establish that evidence of a federal crime, secured by an illegal entry and trespass, may not be used by the prosecution. The protection against the search for and taking of evidence by such means

> "* * * reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal systems with the enforcement of the laws." *Weeks* v. *United States*, 232 U. S. at page 392.

The government does not deny its entry upon Shulman's premises, and does not deny the illegality of that entry. The government's proofs were that the illegal entry was made for the purpose of installing the carbon microphone. This later proved defective, and was therefore not used (R. 101, 119, 152). However, the government did admittedly use the contact detectaphone (R. 123, 133, 152). Its use was admittedly aided by that illegal entry (R. 103, 112-114, 120-121, 140-142). It may or may not be true, as the government argues in its brief, that the detectaphone *could have been* used just as effectively without the unlawful breaking into Shulman's office. But that is of no moment. The essential fact is that the federal agents *did* use the information and help achieved through their trespass. Their "unreasonable search" without warrant, and in violation of the Fourth Amendment, apprised them of the fact that Shulman's suite of offices in Rooms 1509-1510 was divided by partitions into several smaller rooms, one of which was Shulman's private office (R. 113, 141-142); that that private office had only one wall in common with Room 1508 (R. 113, 140); and that only a portion of the entire

side wall of Room 1508 was a common or party wall with that portion of Room 1509 which was Shulman's private office. Without such knowledge, the agents might have placed the detectaphone against that portion of the wall of Room 1508 which was not in common with Shulman's private office. Without such knowledge, the agents might have attempted to use the detectaphone against the wall of Room 1510, furthest distant from Shulman's private office. So used, the detectaphone might have been incapable of enabling the agents to overhear anything. Without such knowledge, the federal agents might have spent so much time in experimenting with locations for their detectaphone as to have lost their opportunity to hear what was being said in Shulman's private room.

In considering the facts of this case the Court is not concerned with whether the evidence *could have been* secured by legal means, nor with the precise extent to which the unconstitutional act aided in securing the evidence. The essence of the unlawful conduct was the invasion by government agents of the "privacy of the accused", *Weeks* v. *United States*, 232 U. S. at page 394. Any such invasion of that right of privacy, though later deemed unnecessary, or to whatever extent, slight or great, instrumental in securing evidence, results in tainting all the evidence thereby secured.

> "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefensible right of personal security, personal liberty and private property, * * *." *Boyd* v. *United States*, 116 U. S. at page 630.

The fact that the agents of the Federal Bureau of Investigation utilized in some measure their illegal entry into Shulman's suite of offices to aid them in obtaining their evidence, rendered the use of that evidence unconstitutional.

POINT TWO.

The use of evidence secured through a contact microphone affixed to petitioner's premises, was a violation of petitioners' rights under the Fourth Amendment.

Reversal of the rulings below should not, however, rest on any such narrow ground as the unlawful breaking into and entry upon Shulman's premises. Even without such direct physical entry, the use of the contact microphone was itself an invasion of the petitioners' rights under the Fourth Amendment. The historical background of the Fourth Amendment set forth in this court's opinion in *Boyd* v. *United States supra,* makes that entirely clear.

In its brief and argument submitted at earlier stages in these proceedings, the government has argued that, those who commit acts or say words within the sight or hearing of other persons, do so at the risk of being seen or overheard. Examples were cited in the use of the common eyeglass for those deficient in sight, and in the use of the common earphone or artificial eardrum for those deficient in hearing. It was argued that such persons may freely, without violating the Fourth Amendment, utilize such means to see and hear things openly done and said in their presence. We concede the soundness of that position.

We dispute, however, the government's further argument that microphones, of great sound-amplifying power

and specially used to invade privacy against the wishes of the individual, are in the same category as the common artificial eardrum. The use of such inventions as the contact microphone to invade privacy is contrary to the Fourth Amendment.

As has been pointed out above, the essence of this amendment is its protection of the right of privacy; a man's right to keep inviolate his papers, possessions, words, and expressed thoughts from all unreasonable search and seizure; that is to say, free from search and seizure except upon judicial warrant issued in accordance with the specific provisions of the Fourth Amendment. That right of personal privacy extends rather more forceably to a person's thoughts and utterances. It cannot be said that those thoughts when placed in words upon a sheet of paper are more immune from surreptitious scrutiny or seizure than the same thoughts set forth in spoken words.

A man's thoughts, stated in loud utterances from a public square, are by his own act, no longer private, and therefore may be seized upon and utilized for any proper purposes by officers of the law and the general public alike. Thoughts uttered carelessly, with no precaution against their being overhead, may be used by all who casually overhear. In either case, the initial right of privacy has been destroyed by the person himself through his deliberate or careless act.

The framers of our constitution made no specific mention of detectaphones. This was not solely because such devices did not then exist; no mention was made in the Fourth Amendment of even those devices for search and seizure which did then exist. This amendment was designed

to express the fundamental law in such broad terms as would embrace every present and future circumstance. The contrary view would serve only to stultify the constitutional principles.

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future in their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into lifeless and impotent formulas. Rights declared in words might be lost in reality." *Weems* v. *United States*, 217 U. S. 349, 373.

Certainly, if it came to the attention of this court that some unauthorized person had surreptitiously listened to its deliberations on this very case, the court would recognize it as an invasion of its privacy, without regard to whether that invasion had been accomplished by means of a carbon

microphone inserted within the room, or by a detectaphone placed outside of those chambers or at a distance. Invasion of privacy by the use of a modern scientific method, which penetrates the shielding partition invisibly, is no less real than invasion by use of crowbar and battering ram.

If the incalculable powers of human ingenuity should devise a method of removing articles from a man's home without the taker's physical entry therein, or a method of photographing documents locked away in private chambers without visible physical entry into those chambers, this court would assuredly hold that there had been an invasion of the personal privacy secured by the Fourth Amendment.

In no case is it the actual physical breaking or entry, in no case is it the trespass, which is the gravamen of the offense. *Boyd* v. *United States, supra.* It is the invasion of the right of privacy without justifiable cause, which the Fourth Amendment outlawed.

The vigilance required by the Fourth Amendment should be doubled in this case, because it involves privilege,* which is a special aspect of the constitutional right of privacy.

This court will not permit constitutional safeguards to be whittled away by hair-splitting distinctions, nor by the "adventitious circumstances" of the particular case before it.

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* The privileged character of communications between attorney and client has been recognized and respected in every English and American jurisdiction where the question has arisen. 70 *Corpus Juris* 435; *Jones on Evidence*, 3d ed., p. 1156.

> "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon". *Boyd* v. *United States*, 116 U. S. at p. 635.

In fulfillment of that duty, and in consonance with the broad scope of our constitution, expressed in *Weems* v. *United States, supra*, this court will not find it difficult to recognize and deal with the most modern and scientific devices for the invasion of privacy.

Conclusion.

For the reasons above stated, the Circuit Court of Appeals for the Second Circuit erred in sustaining the trial court's denial of the motions to exclude and suppress the evidence secured by means of the detectaphone, and the trial court's overruling of the objections to the testimony when offered in evidence, and the convictions below should be reversed.

Respectfully submitted,

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